*Cleveland* (1885) 43 Ohio St. 481. In that case the city of Cleveland had conveyed lands to the society which the latter had encumbered with various mortgages. Thereafter the attorney-general had the society adjudged not to have been legally incorporated. The question was whether the society could be grantee from the city as a *de facto* corporation. It was *held*, that the doctrine of *de facto* corporations is not based on any theory of estoppel but on public policy, and that a corporation *de facto* may be a grantee. "The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void." The *de facto* corporation then can be justified on no principle of law. It is an expedient, a fiction, adopted to attain a just result when the parties have failed to give true legal effect to their intentions—an equitable as opposed to a legal doctrine.

The question then remains whether there is any ground for distinction between the case where third parties are concerned, and the case where the "shareholders" are acting *inter sese*. On strict legal theory their relation should be the same in both cases, for if they are partners to the world, this relation results from the status created by their acts, *Coleman* v. *Coleman* (1881) 78 Ind. 344; Parsons (James) on Partnership §§ 45, 48, 50; *Whipple* v. *Parker*, *supra*, and not by reason of any holding out—they held themselves out as a corporation. However, there are jurisdictions which regard the same association as a corporation under certain circumstances but as a partnership under other circumstances. The cases of *Bushnell* v. *Consolidated Ice Machine Co.* (1891) 138 Ill. 67 and *Loverin* v. *McLaughlin* (1896) 161 Ill. 417, taken together, illustrate this. In the former case one shareholder was not allowed to sue another on a partnership basis, since both parties had intended to stand towards each other in the position of shareholders in a corporation. In the latter case, the shareholder was not allowed to rely on the *de facto* corporation to avoid his personal liability as a partner to a third party. If rigidly adhered to, this position would lead to the unjust result that a shareholder might be liable to third parties as a partner for the association's obligations, but then would be unable to compel contribution from his fellow-shareholders on a partnership basis. In Maryland, where the principal case was decided, it has been held that the shareholders are partners as to third parties. *Buonaparte* v. *Hampden* (1892) 75 Md. 340. It seems therefore, logical and just that they should be so treated *inter sese*, a result contrary to that reached in the principal case.

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THE LOTTERY CASE.—In the latest decision on the distribution of powers under our federal system, the Supreme Court has again taken a national point of view. *The Lottery Case* (1903) 188 U. S. 321. In holding that Congress may prohibit the carrying of lottery tickets by carriers from one State to another, it has strengthened the central government in two particulars. First, the commerce which Congress may regulate is conceived of broadly; and second, the power of regulating it is held to include to some extent the power of prohibiting it.

Lottery tickets are subjects of commerce, says the Court, because they are subjects of traffic. There would seem to be no objection to

such a position were it not for some previous decisions. In *Paul* v. *Virginia* (1868) 8 Wall. 168, and *New York Life Ins. Co.* v. *Cravens* (1900) 178 U. S. 389, it has been held that insurance business carried on between citizens of several States is not interstate commerce. These and similar decisions seem to the four dissenting justices insurmountable obstacles, as a lottery ticket is nothing more than a claim, contingent in character, against the lottery company. But the majority opinion pays no attention to them, and they are distinguishable, it may be, on the ground that they involved no actual carriage of tangible articles from one State to another. The carriage of things for hire might well be considered commerce, like the carriage of persons, irrespective of the purpose for which the things themselves are used.

That the power given to Congress in the Constitution to regulate interstate commerce was meant to include the power to forbid it, is probably a fair proposition for debate. Neither the majority nor the minority opinion however puts forth any satisfactory reasoning for the interpretation which it urges HARLAN, J., for the majority, begs the question in triumphantly quoting from MARSHALL that the power "acknowledges no limitations other than are prescribed in the Constitution," and then calling upon the other side to point out some limiting clause. But the point has been practically settled by the acquiescence of the nation in the Embargo Acts of a century ago. FULLER, C. J., gives no authority for his attempted distinction between the powers of Congress over interstate and over foreign commerce. The result of the decision is that the word "regulate" in this clause is practically equivalent to "control."

The widespread interest the case has aroused is due in great measure to the possibilities it suggests. The Court carefully limits its decision to carriage by independent carriers, and to the carriage of lottery tickets. Perhaps the taking of lottery tickets from one State to another by a person for his own use would be beyond the control of Congress, on the ground that under the distinction already suggested it would not be interstate commerce. But the ground of the limitation to lottery tickets which most of the States have decided to be dangerous to public morals, is not apparent. The powers of Congress must be totally independent of the policy of the States, and of any changes therein. Nor can the power to prohibit be limited to what is against public health and morals; to repeat the quotation from MARSHALL, "the power to regulate acknowledges no limitations other than are prescribed in the Constitution." Those limitations are found in the ninth section of Article I and in the first ten amendments; but the only one bearing on this matter is the guaranty of due process of law in the taking of life, liberty and property. Amend. V. The prohibition of combinations in restraint of trade is not an unlawful deprivation of liberty, *U. S.* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505; and neither, it would accordingly appear, would be the prohibition of interstate transportation of goods manufactured by such a combination.

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PRIORITIES IN PARTIAL ASSIGNMENTS OF MORTGAGE DEBT.—The rule that in equity the mortgage follows the debt, so that an assignee of